91-1316

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

LAWRENCE A. MARCELLUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Court of Appeals

Colorado Court of Appeals No. 88CA1696

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QUESTION PRESENTED FOR REVIEW

Under *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), police may interrogate a person in custody who has invoked their Fifth Amendment right to counsel only if the person "initiates further communications, exchanges, or conversation with the police" and then waives *Miranda* rights. The question presented here is whether a person can make that initiation by an ambiguous communication through an agent, i.e., directing a spouse to tell the police that the person committed an as yet undiscovered murder.

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PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Court of Appeals
Colorado Court of Appeals No. 88CA1696

The People of the State of Colorado respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals entered in this proceeding on May 23, 1991.

OPINION BELOW

The opinion below, *People v. Marcellus*, 819 P.2d 555 (Colo. App. 1991), is attached as Appendix A.

JURISDICTION

Colorado invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (1988) because the Colorado Court of Appeals decided an important question of federal law that should be settled by this Court. Sup. Ct. R. 10.1(c).

The Colorado Court of Appeals based its decision entirely on federal constitutional grounds. It did not rely on any independent state ground in support of its holding.

After the court of appeals issued its first opinion, Colorado timely filed a petition for rehearing. The court of appeals modified its opinion into its present form and denied the petition (App. A). Colorado then timely filed a petition for writ of certiorari in the Colorado Supreme Court. On November 12, 1991, the supreme court denied the petition, with two of the three needed justices voting to grant certiorari review. The supreme court's order denying certiorari review is attached as Appendix B.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself...."

The Fourteenth Amendment provides: "No State shall ... deprive any person of life, liberty, or property without due process of law...."

STATEMENT OF THE CASE

Based almost entirely on confessions he made to law enforcement officers, Lawrence Marcellus was convicted of the first-degree murder of Gregory "Spike" Barker (v. 1, pp. 1-2, 150). Marcellus moved at trial to suppress the confessions (v. 1, pp. 41-42, 52-53, 60, 87-98). The trial court denied the motion (v. 5, pp. 4-26). On May 23, 1991, the Colorado Court of Appeals reversed, finding that the confessions should have been suppressed (App. A).

A. Marcellus Confessed.

On September 3, 1987, Marcellus and his wife were arrested for aggravated robbery (v. 2, pp. 26-27). Marcellus was advised of and waived his *Miranda* rights (v. 2, pp. 27, 31-32). After giving an oral statement to a detective, Marcellus said he would not give a written statement until he had an attorney (v. 2, p. 33). The detective ended the interview (*id.*).

The next morning at an advisement hearing, Marcellus and his wife invoked their Sixth Amendment right to counsel concerning the robbery charges (v. 3, p. 92). That afternoon, Mrs. Marcellus's family informed Colorado authorities that she told them that Marcellus murdered someone within the last few days (v. 3, pp. 36-38).

Two detectives went to interview Mrs. Marcellus (v. 2, pp. 42-43; v. 3, p. 39). She told them: "I knew you were coming over to talk to me[;] my husband told me to go ahead and talk to the police when they came" (v. 2, p. 54). She then told the detectives that her husband confessed to her he had killed Barker, a long-time friend of his, a couple of days earlier (v. 2, p. 56). She related some of the particulars about the murder, including the location of Barker's body. Mrs. Marcellus explained that her husband told her to tell the police about the murder "so they don't take our baby from us" (v. 2, p. 61).[1]

Mrs. Marcellus's statement was the first law enforcement authorities knew of Barker's murder. While her interview

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[1] Marcellus testified at the suppression that he spoke with his wife at the advisement hearing and in a jail visit (v. 3, pp. 132, 134). He explained that his intent was to insure that his wife did not get charged with Barker's murder, and that she would therefore be available to care for their child (v. 3, pp. 132-36).

continued, some officers went to find Barker's body. Another detective went to ask Marcellus if there was any truth to his wife's story (v. 2, pp. 79-80).

The detective took Marcellus from jail across the street to a police office (v. 2, pp. 80-82). He did not say anything to Marcellus until they arrived (v. 2, p. 82). Once there, the detective removed Marcellus's handcuffs and introduced himself (v. 2, p. 83). Marcellus, who appeared to have been expecting the interview, spontaneously stated, "Gregory Barker, good old Spike, he should have paid me" (*id.*).

The detective stopped Marcellus and began advising him of his *Miranda* rights. Marcellus interrupted the advisement, saying,

> I know what my rights are, you don't have to do that, just give me that thing and I will sign it and I will give you any statement you want. I already know -- I know what this is all about.... Did you guys talk to my wife? I told her to tell you guys about it, Mr. Gregory Barker, what a fool.

(v. 2, pp. 83-84; v. 3, pp. 20-25). The detective stopped Marcellus and finished advising him of his *Miranda* rights. Marcellus then voluntarily waived those rights (v. 2; pp. 86-88; People's Exhibit C).

Marcellus told the detective how he had tired of Barker leeching food, clothing, shelter, and illegal drugs off of him (v. 2, p. 91). The final straw came when Barker refused to repay him for part of the cost of a single dose of methamphetamine (v. 2, p. 92). Marcellus told how he rat-poisoned and then stabbed Barker to death (v. 2, pp. 92-93).

Marcellus agreed to give a videotaped statement (v. 2, p. 94). He again was advised of and voluntarily waived his *Miranda*

rights (v. 2, p. 95). At no time during the interview did Marcellus invoke his right to counsel (*id.*).

On the tape, Marcellus verified that he had been advised of his *Miranda* rights, understood, and voluntarily waived them (People's Exh. B). He then told in great detail how and why he murdered Barker (*id.*). He finished by stating, "I told her to tell you" (*id.*).

Police officers found the murder scene and condition of Barker's body as Marcellus described it. Barker's possessions stolen from his corpse were found in Marcellus's apartment where he said they would be. No evidence directly linking Marcellus to Barker's murder independent of his confessions was discovered.

B. The Trial Court Admitted Marcellus's Confessions.

Marcellus's enthusiasm for responsibility cooled as he awaited trial. He moved to suppress his oral and videotaped confessions, claiming they were the result of threats by the detective (v. 3, pp. 100-02, 122-23). Marcellus denied blurting out anything at the beginning of the interview (v. 3, pp. 126-27), and gave contradictory testimony about whether he told his wife to tell the police he had murdered Barker (*see* v. 3, pp. 127, 132, 135-39).

The trial court found that Marcellus was not a credible witness and that the several officers who testified were (v. 5, pp. 7-11, 23-24). It found that Marcellus stated, "I told her to tell you" (v. 5, p. 11), and that Mrs. Marcellus stated, "I knew you were coming, my husband told me to talk to you" (v. 5, p. 12).

The trial court further found that Marcellus blurted out to the detective, "I know what this is all about, did you talk to my wife?" and "I told her to tell you. Mr. Gregory Barker. What a

fool. Just give me the advisement and I will sign it and make any statement you want" (v. 5, pp. 17-18).

The trial court denied Marcellus's motion to suppress. It ruled that Marcellus initiated contact with the police when he "set into motion a series of events ... from which any reasonable person could conclude that he would be personally contacted by the police" (v. 5, p. 21). It further ruled:

> Where one has confided in his wife most of the very gruesome details of the murder by the husband of someone else, [and] the husband tells the wife to go ahead and tell the police, one must reasonably conclude that the police are going to come and talk to you

(v. 5, p. 22). The trial court determined that Marcellus had not been threatened by the detective, and that Marcellus had waived his *Miranda* rights (v. 5, p. 18).

C. The Court of Appeals Suppressed the Confessions.

The Colorado Court of Appeals affirmed the trial court's finding that Marcellus invoked his Fifth Amendment right to have counsel present during custodial interrogations when, during his interrogation about the robbery charges, he said he would not reduce his oral statement to writing until he had an attorney (App. A at 6). It did not challenge the trial court's findings of fact, its credibility determinations, or its ruling that Marcellus waived his *Miranda* rights when he confessed to Barker's murder.[2]

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[2]The court of appeals correctly determined that Marcellus's invocation of his Sixth Amendment right to counsel concerning the robbery charges did not affect the validity of his confessions to Barker's murder (App. A at 5). In *McNeil v. Wisconsin*, 111 S. Ct. 2204, 115 L.

The court of appeals held, however, that the trial court erred in finding that Marcellus initiated communications with the police by telling his wife to tell them about Barker's undiscovered murder. Rather, according to the court, they should have interpreted Marcellus's directions to mean only that his wife was to inform on him, not that he wanted to confess personally (App. A at 6-7).

The court did not address the inculpatory statements Marcellus blurted out to the detective, and which the detective had to stop in order to advise Marcellus of his *Miranda* rights, as evidence that Marcellus wanted to confess to Barker's murder. The court considered it important to its decision that "there is only one suggestion in the record as to defendant's motive in directing his wife to speak with the police about the killing" (App. A at 7).

REASONS FOR GRANTING THE WRIT

This is not a case where there is any doubt that the person convicted of committing a brutal murder was the person who did it. Nor is this a case where police officers used coercive tactics or psychological trickery to force a person to confess to a crime.

Rather, this is a case where a detective reasonably acted on what a person in custody told his wife to communicate to the police. The detective went to the source of that information, the husband, to ask him if it was true. The husband, in turn, immediately started confessing. The husband's confessions were suppressed even though they were not the result of compulsion

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Ed. 2d 158 (1991), this court held that an invocation of the Sixth Amendment right to counsel as to one charge does not invoke the Fifth Amendment right to counsel in unrelated investigations.

prohibited by the Fifth Amendment.

A. The Decision Here is Analytically Flawed Under This Court's Precedents.

The Fifth Amendment, as applicable to the states by the Fourteenth Amendment, provides that a criminal defendant may not be compelled to testify against himself. To protect against the use of compulsion in the taking of confessions, if an individual being interrogated "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). A person who has invoked this right may not be interrogated by the authorities until he has been provided with counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (jailer told accused "he had" to speak with the investigating officers). *See also Minnick v. Mississippi*, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) (accused told he would "have to talk" to investigators and "could not refuse").[3]

The *Edwards* rule was "designed to protect an accused in police custody from being badgered" into confessing. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). *See also Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of Fifth Amendment right to counsel valid if "the product of a free and deliberate choice rather than intimidation, coercion, or deception"); *Miranda*, 384 U.S. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment").

Members of this Court recognized, though, that "[i]t is not unusual for a person in custody who previously expressed an

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[3]The *Edwards* rule applies in situations such as here, where a person invokes their Fifth Amendment right to counsel while being interrogated about one offense, and the authorities later interrogate the person about an unrelated offense. *Arizona v. Roberson*, 486 U.S. 675 (1988).

unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). The Court therefore provided an exception to the general rule. Police officers may interrogate a suspect who has invoked his Fifth Amendment right to counsel *if "the accused himself initiates further communications, exchanges, or conversation with the police,"* *Edwards*, 451 U.S. at 485 (emphasis added), and then waives his Fifth Amendment rights, *Bradshaw*, 462 U.S. at 1044.

A person in custody who has invoked his Fifth Amendment right to counsel and wants to waive that right might not make his wishes perfectly clear. He can, therefore, initiate contact, leading to a valid waiver, by "suggestion or request," *Edwards*, 451 U.S. at 487, or by an "ambiguous" communication, *Bradshaw*, 462 U.S. at 1045-46. The test is whether the contact by the defendant with the authorities was capable of being "*reasonably interpreted* by the officer as *relating generally* to the investigation." *Bradshaw*, 462 U.S. at 1046 (emphasis added).

Applying the simple language of *Edwards* and *Bradshaw*, it is clear that it was Marcellus who initiated communications with the authorities about Barker's murder. Until the communications from Marcellus to the police through his wife, the police knew nothing of Barker's murder, let alone the fact that Marcellus did it. If Marcellus had not wanted to communicate with the authorities about Barker's murder, he would not have directed his wife to tell them about it.

The Colorado Court of Appeals required the detective who accepted Marcellus's confessions to determine, without speaking to him, whether Marcellus's directions to his wife were an indication that he wanted to accept responsibility for Barker's murder. To do that, the detective would have had to engage in hyper-technical language analysis, assuming all the while that Marcellus could not

possibly be interested in talking about Barker's murder. *Cf. Colorado v. Connelly*, 479 U.S. 157, 165-66 (1986) (there is no "far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision"). *See also Plazinich v. Lynaugh*, 843 F.2d 836, 838-39 (5th Cir. 1988) (a court cannot divorce the *Edward* analysis "from the context of badgering police conduct from which the rule sprang").

B. Police Officers Ought to be Allowed to Determine the Intent Behind Ambiguous Communications From Criminal Defendants.

By its plain language, the Fifth Amendment was designed to insure that criminal defendants are not compelled to testify against themselves. The explanatory gloss put on this rule by the Colorado Court of Appeals removed the compulsion requirement from the Fifth Amendment, and penalizes law enforcement officers for accurately determining whether, based on an ambiguous communication from someone appearing to act as his agent, a suspect is interested in communicating with the authorities about an offense.

The principle purpose of the criminal justice system is to insure that persons guilty of committing crimes are held accountable for those crimes. An adjunct of that rule is that law enforcement officers be encouraged, within constitutional limits, to collect the evidence needed to prove that a particular person did in fact commit a particular crime.

The Colorado Court of Appeals's decision discourages police officers from following up on sources of information voluntarily given them by persons apparently acting as the agents

of criminal defendants. This decision penalizes law enforcement in a situation where no coercion was used, and where the impetus for contact with the authorities came from the defendant himself. It forces law enforcement officers, when faced by ambiguous communications from suspects about crimes, to assume that no suspect would ever want to talk to them about a crime.

A proper response to ambiguous communications such as Marcellus's is to determine from a suspect what he wants to do. This procedure is followed in many jurisdictions where a suspect makes an ambiguous initial invocation of Fifth Amendment rights. These jurisdictions allow officers to make limited inquiries to clarify the suspect's wishes. *See, e.g.*, *Owen v. Alabama*, 849 F.2d 536, 539 (11th Cir. 1988); *United States v. Foche*, 833 F.2d 1284, 1287 (9th Cir. 1987); *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979); *Holland v. State*, 587 So.2d 848, 856 (Miss. 1991); *Crawford v. State*, 580 A.2d 571, 575-77 (Del. 1990); *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988); *People v. Benjamin*, 732 P.2d 1167, 1171 (Colo. 1987); *State v. Moulds*, 673 P.2d 1074, 1082 (Idaho App. 1983).[4] As the Colorado Supreme Court noted,

> Some flexibility is necessary in these circumstances to ensure that interrogating officers neither persist in questioning a suspect when the suspect does not want to communicate in the absence of an attorney nor forego the opportunity to question a suspect who wishes to waive the privilege of having an attorney present during police interrogation.

Benjamin, 732 P.2d at 1170.

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[4] This court has yet to address this issue. *See Smith v. Illinois*, 469 U.S. 91, 96 (1984).

Here, when the detective went to question Marcellus, Marcellus immediately started confessing and waiving his Fifth Amendment rights. His actions and statements demonstrated clearly that his intent in directing his wife to speak with the authorities was to take responsibility for Barker's murder.

The test for determining whether a suspect initiates contact with the authorities about a crime should be whether the suspect caused, in one way or another, information about a crime to be communicated to the police. Where the communication is ambiguous, officers should be allowed to follow up on that information to determine whether the suspect is interested in speaking directly to the authorities.

That was what the authorities did here. The police received a communication about a crime from Marcellus' wife. She appeared to act as his agent. The detective went to Marcellus to see if there was any truth to the communication. Marcellus confirmed the agency relationship, and then immediately started confessing and waiving his Fifth Amendment rights. No compulsion was involved in accepting the confessions, and they should not have been suppressed.

C. The Decision Here Appears to Conflict with the Decision of a State Supreme Court.

This is not the first case that involved an initiation of communications with law enforcement officers as the result of a third party acting as an agent with apparent authority. The Ohio Supreme Court addressed that issue and reached a different result in *State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988).

In *Van Hook*, the defendant's mother led an officer to believe that her son, who was in custody and had invoked his Fifth Amendment right to counsel, wanted to speak with him. The officer went to the defendant, "after and because of what [the defendant's] mother had said to him." *Id.* at 887. Upon meeting the officer, the defendant said he wanted to make a statement, waived his *Miranda* rights, and confessed. The court held the confession admissible since the officer acted on what the mother told him, and as soon as he saw the defendant, the defendant said he wanted to give a statement and waive his *Miranda* rights. *Id.* at 887-88. The Colorado Court of Appeals should have reached a similar result.

D. The Importance of this Case.

Both this Court and commentators recognize the toll *Miranda* extracts on the public's interest in being protected from criminals. *E.g.*, *Oregon v. Elstad*, 470 U.S. 298, 312 (1985); *United States v. Janis*, 428 U.S. 433, 448-49 (1976); Markman, The *Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. Chi. L. Rev. 938, 948 (1987). Because of that concern, this Court has directed that the *Edwards* rule not be applied so as to cause "unjustifiable restriction[s] on reasonable police questioning." *Wyrick v. Fields*, 459 U.S. 42, 49 (1982). *See also Michigan v. Tucker*, 417 U.S. 433, 444 (1974) ("The suggested safeguards [in *Miranda*] were not intended to 'create a constitutional straightjacket'").

The toll Colorado will pay here will be the complete release of an admitted murderer. The court of appeals's suppression order "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself." *Elstad*, 470 U.S. at 312. Uncorrected, *Marcellus* will

extract a continuing toll in Colorado, resulting not in the reversal of other valid convictions, but also by insuring that police officers do not zealously pursue uncoerced evidence. The opinion tells Colorado police officers not to bother investigating communications voluntarily provided by people who have invoked their *Miranda* rights.

Moreover, *Marcellus* will likely have great import outside of Colorado. The only related case, *Van Hook*, was rendered by a divided court. Courts across the country could view *Marcellus* and the *Van Hook* dissent as representing the correct interpretation of the United States Constitution. A continuing lack of controlling authority by this Court on third party and ambiguous initiations could well cause other jurisdictions to suffer the same dire results Colorado will suffer here. In addition, a lack of direction on these issues leaves law enforcement officers everywhere unsure of how to perform their vital function within constitutional norms. This Court should take this opportunity to stop a dangerous misinterpretation of federal constitutional law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

COLORADO COURT OF APPEALS — May 23, 1991
No. 88CA1696

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Lawrence L. Marcellus,

Defendant-Appellant.

Appeal from the District Court of the City and County of Denver

Honorable Paul A. Markson, Jr., Judge
No. 87CR2122

Division I — JUDGMENT REVERSED
Opinion by JUDGE CRISWELL — AND CAUSE REMANDED
Pierce and Reed, JJ., concur — WITH DIRECTIONS

Opinion Modified, and as Modified,
Petition for Rehearing DENIED

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General,

Paul Koehler, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

David F. Vela, Colorado State Public Defender, Warren T. Marshall, Special Deputy State Public Defender, Canon City, Colorado, for Defendant-Appellant

Defendant, Lawrence L. Marcellus, appeals the judgment of conviction entered upon a jury verdict finding him guilty of first degree murder. Defendant argues, among other things, that the trial court erred in admitting his videotaped confession because it was obtained in violation of his Fifth and Fourteenth Amendment rights as implemented by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We agree. Thus, we reverse and remand for a new trial.

Defendant and his wife were arrested for aggravated robbery. While in custody on the robbery charge, a police detective informed defendant of his Miranda rights and interviewed him with respect to that charge. He denied the allegation, but when asked if he would be willing to put his statement in writing, defendant refused and requested that he be allowed to speak with a lawyer. At this point, the police detective terminated the interview, and defendant was placed in a detention cell.

The next day, defendant was taken to court where he was advised of his right to counsel, and he requested representation by the public defender. At some time, either before or after this advisement and request for representation, defendant spoke with his wife and told her to speak with the police respecting a killing.

Later that same day, police learned that the father of defendant's wife had been told that defendant had killed someone. Upon learning this, the police contacted defendant's wife to determine the validity of that information. When the wife was questioned, she stated to the police detective, "I knew you were coming. My husband told me to talk to you." The wife then gave a detailed statement in which she implicated defendant in the commission of the murder.

While the wife was still being interrogated, and at a time before counsel had been appointed for defendant, another police

detective removed defendant from his detention cell and escorted him to a room in the police homicide bureau in order to interrogate him concerning the murder. Upon entering this room, defendant volunteered that he "knew what this was all about." He asked whether the detective had spoken with his wife, and when informed that she had been questioned, defendant stated, "I told her to come talk to you." Defendant was then given a proper Miranda warning, and, in answer to inquiries by the officers, he confessed to the killing that formed the basis for the present charge.

Before the trial court, the defendant moved to suppress this statement, arguing that, after requesting counsel, he did not initiate any further communications with the police and, thus, did not waive his Fifth and Fourteenth Amendment rights to have counsel present during any further police interrogation. The trial court found, however, that defendant's instructions to his wife to speak with the police constituted an implied request that they speak with him also. Hence, the court denied defendant's motion to suppress and admitted defendant's confession into evidence.

I.

Defendant argues that the trial court erred in finding that he had initiated further communications with the police, after initially invoking his right to counsel, merely by telling his wife to speak with them. We agree.

Once a criminal defendant has invoked his right to deal with police only through counsel, he may not be subjected to further interrogation until counsel has been made available to him, unless the defendant himself first initiates further communications with the police. *Edwards v. Arizona*, 451 U.S. 476, 101 S. Ct. 1880,

68 L. Ed. 2d 378 (1981); *People v. Martinez*, 789 P.2d 420 (Colo. 1990). And, an accused initiates a conversation with police only when his comments "evidence a willingness and a desire for a generalized discussion about the investigation." *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

The *Edwards* rule extends even to the police investigation of a separate matter, so that a defendant who has requested the assistance of counsel in response to police questioning respecting one charge cannot be re-interviewed by police concerning a separate offense, unless counsel is first provided to him. *Minnick v. Mississippi*, 498 U.S. ___, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

We do not consider the recent opinion in *McNeil v. Wisconsin*, ___ U.S. ___, 111 S. Ct. 2204, ___ L. Ed. 2d ___ (No. 90-5319, June 13, 1991), 59 L.W. 4636, to have modified the rule in *Edwards* and the later cases of *Roberson* and *Minnick*. *McNeil* involved the offense-specific right to counsel under the Sixth Amendment, which attached only at the commencement of judicial proceedings. Thus, McNeil's request for counsel at a preliminary bail hearing on one charge did not invoke his general right to counsel under the Fifth Amendment and *Miranda* with respect to the investigation of a separate crime, at least in the presence of a later express waiver of that right after a proper Miranda advisement. Here, in contrast, the defendant initially invoked his general Fifth Amendment right during his first custodial interrogation, and the fact that he later also invoked his Sixth Amendment right at the time of his arraignment did not dilute the effect of his initial request for counsel under the Fifth Amendment.

A waiver of the right to counsel under the Fifth Amendment, as implemented by Miranda, is valid only if it is

knowing and intelligent relinquishment of such right. And, the question whether a defendant has waived that right must be determined by "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, *supra*, quoting *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938); *People v. Pierson*, 670 P.2d 770 (Colo. 1983).

Here, it is undisputed that, before he made any statements respecting the present charge, defendant, while in custody, requested to speak with a lawyer and also specifically later requested that the public defender be appointed to represent him. The trial court properly found that defendant's Fifth Amendment right to have counsel present at any further interrogation had previously attached. Thus, the sole question before us is whether the record supports the trial court's determination that defendant knowingly and intelligently waived that right by any later actions or statements.

The trial court's determination that defendant had waived his right to have counsel present at his interrogation under Miranda by initiating a further conversation with the police was grounded solely upon his request to his wife that she speak with the police. The court concluded that this act by defendant "set into motion a series of events . . . from which any reasonable person could conclude that [he] would be contacted personally by the police." Thus, it concluded that, by telling his wife to speak with law enforcement agents, defendant must, necessarily, have intended to have them speak with him, as well.

Even if we assume that a defendant may knowingly initiate further conversation with police by means of a third party for purposes of the *Edwards* rule, we conclude, nevertheless, that the trial court's determination, although viewed as a factual inference, lacks proper record support.

Courts must indulge every reasonable presumption against, not in favor of, a waiver of constitutional rights. *See Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Here, there is only one suggestion in the record as to defendant's motive in directing his wife to speak with the police about the killing. Both defendant and his wife were being retained by the authorities, and defendant expressed concern that, unless his wife spoke with police to exonerate herself from any connection with the killing, both she and defendant would continue to be retained, and they would both be deprived of the custody of their young child. However, by exonerating herself, the wife could be released to care for that child.

Under these circumstances, we conclude that it is unreasonable to infer that defendant's desire to have his wife speak with police indicates an intent to initiate further conversations with them himself. And, simply because it is foreseeable that the police would want to speak with defendant once his wife made her statements, this fact alone does not show a waiver by defendant of his right to have counsel present during any interrogation.

Further, the record does not establish that defendant's statements to his wife took place after his request to have an attorney appointed to represent him. Even if a criminal defendant could unambiguously indicate an intent to waive his Fifth Amendment right to counsel based on statements he made to his wife, certainly no statements made prior to his assertion of his Fifth Amendment right can be used to establish a waiver of that right. *See People v. Johnson*, 712 P.2d 1048 (Colo. App. 1985) (once defendant requests representation by public defender, failure to provide defendant with a public defender or private attorney before initiating further communication with him violates the *Edwards* rule).

For these reasons, we conclude that the trial court erred in finding that defendant initiated further conversations with police after invoking his right to counsel. Accordingly, we also conclude that the court erred in refusing to suppress defendant's confession.

II.

Defendant also argues that the trial court erred in holding that he had waived one or both of the spousal privileges created by § 13-90-107(1)(a)(I), C.R.S. (1987 Repl. Vol. 6A). However, because the wife was not called as a witness to testify and the issue was presented only during the course of the suppression hearing, it is not evident that the same issue will be presented during the course of any new trial. Even if the issue is then presented, the circumstances may be sufficiently different upon retrial as to make any opinion that we might now render upon that issue more academic than useful. Hence, we decline to address that issue in this appeal.

The judgment of the trial court is reversed, and the cause is remanded to the trial court for a new trial.

JUDGE PIERCE and JUDGE REED concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
Case No. 91SC480
Certiorari to the Colorado Court of Appeals 88CA1696
Denver District Court 87CR2122

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

LAWRENCE L. MARCELLUS,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 12, 1991.

CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK would grant as to the following issues:

Whether a person invokes the right to have counsel present during custodial interrogation when, after waiving that right and giving an oral statement, the person requests counsel before reducing the statement to writing.

Whether, in any event, a person who has invoked his right to have counsel present during custodial interrogation initiates communications with the law enforcement authorities about crime: (1) when he orders his wife to tell law enforcement authorities that he committed a crime, and (2) when once in the present of law enforcement officer s he begins, without prompting, to confess to the crime.

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